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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 13

WILLIAM H. BLACK AND RUTH F. BLACK, *Petitioners*,

vs.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES AND LARRY STITES, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY LOIS L. STITES, THEIR MOTHER AND NEXT FRIEND; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER AND FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, A CORPORATION, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

DOUGLAS F. SMITH,
ARTHUR R. SEDER, JR.,
MARTIN M. LUCENTE,
RICHARD L. SELLE,
11 South La Salle Street,
Chicago 3, Illinois,
D. ARTHUR WALKER,
201½ South Summit Street,
Arkansas City, Kansas,
Attorneys for Respondents.

BURRELL BARASH,
JACK O. BROWN,
OLIVER H. HUGHES,
SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

INDEX.

	PAGE
Statute and Rule Involved	1
Questions Presented	3
Statement	3
Preliminary Statement	3
The Facts	3
The Legal Actions	8
Summary of Argument	12
Argument	16
I. The Question Upon Which Petitioners Sought Certiorari Is Not Present Upon the Facts in This Case; Petitioners Have Conceded the Applicable Principles of Law	16
A. The Claims Here Involved Are Interdependent Claims to a Common Trust Fund Subject to Court Control	22
B. This Case Is Indistinguishable in Principle From Dickinson v. Burnham, Which Petitioners Concede to Be Correct	29
C. The Writ Should Be Dismissed as Improvidently Granted	36
II. The Exercise of Ancillary Jurisdiction Over Interdependent Claims Is An Historical Function of Courts of Equity	37
A. This Court and the Federal Courts Generally Have Long Permitted Intervention Without Regard to Diversity in Cases of This Kind	37
B. The Federal Rules of Civil Procedure Do Not Determine Jurisdictional Questions	45

III. The Jurisdiction of the Courts Below Is Also Sustained by the Allegation of a Federal Statutory Cause of Action 48

IV. Petitioners' Subsidiary Arguments Attempt to Raise Issues Foreclosed by This Court's Order on Certiorari and Introduce Patent Irrelevancies 51

A. The View That Diversity Jurisdiction Should Be Abolished Provides No Proper Basis for Judicial Action 51

B. In Arguing Claims of Substantive Error Petitioners Have Disregarded This Court's Limitation of Its Grant of Certiorari 53

C. Petitioners' Suggestion That "Procedural Confusion" Requires a Broad Remand to the Trial Court Constitutes An Effort to Relitigate Substantive Questions Foreclosed by the Order of the Court 55

Conclusion 58

Appendix 59

CITATIONS.

Cases Cited.

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315 50
Barnes v. Alexander, 232 U. S. 117 40
Burford v. Sun Oil Co., 319 U. S. 315 52
Camp v. Gress, 250 U. S. 308 56
Conolly v. Taylor, 2 Pet. 556 56
Clark v. Paul Gray, Inc., 306 U. S. 583 .....42, 43
Dickinson v. Burnham, 197 F. 2d 973 (2nd Cir.), ...13, 14, 17, 18, 29, 30, 31, 32, 33, 34, 35, 42, 44, 46, 47
Dickinson v. Rinke, 11 Fed. Rules Serv. 489..... 34
Errion v. Connell, 236 F. 2d 447 (9 Cir. 1956) 50
Farmer's Loan & Trust Co. v. Lake Street Elevated R. Co., 177 U. S. 51 44
Fischman v. Raytheon Mfg. Co., 188 F. 2d 783 (2nd Cir.) 49, 50
Fratt v. Robinson, 203 F. 2d 627 (9th Cir.) 49, 50
Freeman v. Howe, 24 How. 450 38
French v. Gapen, 105 U. S. 509 40
Fulton National Bank v. Hozier, 267 U. S. 276 43
Gibson v. Shufeldt, 122 U. S. 27 43
Handley v. Stutz, 137 U. S. 366 .....38, 39, 43, 44
Harkin v. Brundage, 276 U. S. 36 44
Horn v. Lockhart, 17 Wall. 570 56
Hurn v. Oursler, 289 U. S. 238 50
Kardon v. National Gypsum Co., 69 F. Supp. 512 (E. D. Pa. 1946) 50
Knowles v. War Damage Corp., 171 F. 2d 15 (D. C. Cir.) 47

Krippendorf v. Hyde, 110 U. S. 276 38
Leary v. United States, 224 U. S. 567 40
Lesnick v. Public Industrial Corporation, 144 F. 2d 968 (2nd Cir.) 53
Lyon Bonding Co. v. Karatz, 262 U. S. 77 43
Moore v. New York Cotton Exchange, 270 U. S. 593 ..42, 50
Morgan's L. & T. R. Co. v. Texas Central Ry. Co., 137 U. S. 171 40
Myers v. Fenn, 5 Wall. 205 40
National Bank of Commerce v. Allen, 90 F. 535 43
Peckham v. Family Loan Co., 212 F. 2d 100 (5th Cir.) 41, 42
Peckham v. Ronrico Corp., 211 F. 2d 727 (1st Cir.) .. 41
Pennsylvania Co. for Insurances v. Decker, 123 F. 2d 979 47
Phelps v. Oaks, 117 U. S. 236 40
Remar v. Clayton Securities Corp., 81 F. Supp. 1014 (D. Mass. 1949) 50
Richmond v. Irons, 121 U. S. 27 40
Rock Drilling, Blasting, etc. v. Mason & Hanger Co., 217 F. 2d 687 (2d Cir.) 43
Siler v. Louisville and N. R. R. Co., 213 U. S. 175..14, 50, 51
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 36
Speed v. Transamerica Corp., 99 F. Supp. 808, 135 F. Supp. 176 (D. Del. 1955), aff'd 235 F. 2d 369 (3 Cir. 1956) 50
Steele v. Guaranty Trust Co. of New York, 164 F. 2d 387 (2d Cir.) 35
Stewart v. Dunham, 115 U. S. 61 ...13, 32, 38, 40, 42, 43, 44
Strawbridge v. Curtiss, 3 Cranch 267 37

Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356 ..... 40, 41, 59, 60
System Federation No. 91 v. Reed, 180 F. 2d 991 ..... 22, 46, 60
Townsend v. Bucyrus-Erie Co., 10 Cir., 144 F. 2d 106 31
Trustees of the Wabash and Erie Canal Co. v. Beers, 2 Black 448 39
United States v. Bank of New York Co., 296 U. S. 463 44
Vattier v. Hinde, 7 Pet. 252 56
Walmac Company v. Isaacs, 220 F. 2d 108 (1st Cir.) 42

United States Statutes and Rules.

Federal Equity Rule 38 ..... 59, 60, 61
Federal Rules of Civil Procedure, Rule 23 ..... 14, 18, 19, 20, 22, 45, 46, 59, 60, 61
Securities and Exchange Commission, Rule X-10B-5, 17 CFR 240.10b-5 ..... 2, 9, 14, 49, 50
Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j 2, 9, 49

Other Authorities.

Chafee, Some Problems of Equity (1950) 40, 46
Loss, Securities Regulation (1951, Supp. 1955) 50
Moore's Federal Practice (2nd Edition) 16, 47
Street's Federal Equity Practice 59

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

STATUTE AND RULE INVOLVED.

In addition to the federal statutes and rules cited by petitioners, the following are involved:

Section 10 of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j, provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • • • •
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule X-10B-5 of the Rules of the Securities and Exchange Commission (17 CFR 240.10b-5) provides:

> "*Employment of manipulative and deceptive devices by any purchaser of a security.* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud.
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

QUESTIONS PRESENTED.

This Court was induced to grant certiorari upon petitioners' representation that the claims in this case are separate and distinct claims related solely in the sense that there are common questions of law or fact and common relief is sought. Respondents deny that this is the fact. The questions actually presented are:

1. Whether, upon this record, the claims in this case are as represented by petitioners or are, on the contrary, interdependent claims to a fund upon which the court below has impressed a constructive trust.

2. Whether the federal question alleged in the complaint vested the court with jurisdiction irrespective of the citizenship of the parties.

STATEMENT.

Preliminary Statement.

Petitioners' statement contains almost none of the facts necessary to an understanding of the nature of the claims involved in this action and sustained by the Court of Appeals. It is limited to a highly colored statement of some of the procedural incidents of this case. In particular, it omits reference to the facts which demonstrate the interdependence of the claims in this action and the recognition of that interdependence by the court below. It is essential, therefore, that the facts necessary to an understanding of this vital issue be stated.

The Facts.

Petitioner W. H. Black, an oil well promoter, went to Illinois in 1938 to obtain financial support for his activities. In Aledo, Illinois, a small farming community, he met

and enlisted the services of Dale G. Ives, an attorney whose clients and acquaintances included most of the respondents in this case. (R. 199-200.) Through Ives, Black was able to obtain funds from a number of people of the community who put their complete trust in Black "to handle their funds fairly and squarely." (R. 201.) Several of the respondents even executed agreements making Black their agent with authority to act "without interference from any parties of the second part." (CR 1524-5.)[1]

Using funds provided by respondents, Black, after acquiring several unproductive oil leases in Illinois, moved his operations to Kansas, where he joined forces with another promoter, Deering J. Marshall. (R. 202-203.) Ives continued to solicit money from respondents, which he transmitted to Black (R. 199-200, 214-215), and Black used this money to acquire additional leases in Kansas. (R. 222-224.) Thereafter, Black proposed to respondents the formation of Black-Marshall Oil Company (Black-Marshall) to develop the leases he had acquired with their funds. (CR. 639.) Of the stock to be issued by Black-Marshall, Black represented to respondents that he was to receive 11,000 shares or less. (CR. 148, 192-3.) However, after incorporation of Black-Marshall, Black secretly procured the issuance of 64,870 shares to himself in addition to the 11,000 to which he was entitled. (CR. 1557-61, 1569.) Black turned over approximately half of these shares to Marshall and kept the other half—32,457½ shares. When Black was asked on cross examination to explain the issuance of these 64,870 shares, he simply stated: "I don't propose to explain because I can't explain it, sir." (R. 241.)

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[1] References to the printed record in this Court are designated "(R. . .)," while references to the Certified Record filed with the Clerk of this Court but not included in the printed record are designated "(CR. . .)." Emphasis is supplied throughout.

At the incorporation meeting of Black-Marshall, Black told respondents that Ives would continue, as in the past, to act as Black's representative in his dealings with the Aledo group. (CR. 244-5.) Black was elected president and chairman of the board of the directors, the finance committee and the executive committee of Black-Marshall, while Ives was elected secretary-treasurer and director. (CR. 1721-2.) Both held these positions continuously until 1947, when the company was dissolved. Black repeatedly assured respondents that Ives would act as his representative in all Black-Marshall matters. (R. 175; CR. 152-3, 158, 197.)

In June of 1944, Ives told respondents that Black had called him and directed him to tell respondents that the producing properties of Black-Marshall had been sold; that it was necessary for them to send in one-half of their stock to bind the deal; and that the sale price would net about $10 per share. (CR. 679-82, 758-30.) These statements were wholly false. On the basis of the misrepresentations, respondents delivered to Ives the first one-half of their stock (CR. 159-162, 201-202), and Black dispatched the company airplane to bring Ives and the stock to Kansas.[2]

In August of 1945, Black undertook to procure the remaining shares held by respondents. To accomplish this objective, Ives told respondents that the producing property of Black-Marshall had been sold to yield $12 per share on the remaining stock and that Black had instructed him to get in the balance of their stock. (CR. 687.) Spencer Berglund, who had lived in Aledo but later moved

[2] 11,714 of the shares were paid for with Company funds, charged as an advance to Black. (R. 284; CR. 1540-42.) Funds to pay for the balance were raised by a temporary resale of 25,000 shares by Black to some of his associates, most of these shares being reacquired by Black by payment of $17.50 per share of Company funds in the fall of 1945. (R. 390-91, 393-94, 399-402.)

to Florida, received these instructions from Ives by wire dated August 29, 1945:

> "Sold producing property Black-Marshall Oil Company twelve dollars share, kept all Landowners Royalty Company. Sign stock in blank, forward Fourth National Bank, Wichita, Kansas, care Arthur Kincade, immediately. Must be closed September first." (Ex. 81, CR. 1538.)

The statements regarding the sale of the producing properties of Black-Marshall were false. In response to these misrepresentations, respondents turned in the remainder of their stock to Ives, who transmitted it to Black. Shortly thereafter, Ives advised Black that he had forwarded "the balance of the outstanding stock in this community." (CR. 1539-40.) Black paid for this stock entirely with Black-Marshall funds, which were charged as an advance to Black on the Company's books. In all, Black advanced $831,483.06 of Black-Marshall funds to himself to pay for the acquisition of its stock.

By late summer of 1945, Black had succeeded in obtaining all of respondents' stock. About a month later, however, respondent Wadleigh wrote to Black asking for further details about the sale of Black-Marshall. (R. 302.) Black immediately called Ives and asked what reply should be made to Dr. Wadleigh. (CR. 694-5.) Ives replied to Black as follows:

> "Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Company were sold except the property not developed in the Landowners Royalty Company which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing * * *." (R. 303.)

Thus, whatever Black's instructions to Ives regarding the representations to be made to respondents, within a

month after he had acquired their stock Black was expressly informed by Ives of the fraudulent statements that had been made on his behalf. At that time Black had in his possession, indorsed in blank, practically all of the stock which had been secured from respondents, including that temporarily transferred to his associates in 1944. (R. 313-14.) Notwithstanding his admitted knowledge that this stock had been acquired by the fraud and misrepresentation of his agent, Ives, Black did absolutely nothing to repudiate Ives' misrepresentations or to return the stock to respondents. His reason: "I thought it was too late to do anything." (R. 304. See R. 303-5, 313.)[3]

Having obtained all of respondents' stock, Black then turned his attention to the matter of realizing the profits made possible by these fraudulent transactions. This led, in 1947, to a sale of Black-Marshall to National Cooperative Refinery Association (N. C. R. A.). Preliminary to and in preparation for the sale, Black caused the 11,714 shares acquired from respondents with Company funds in 1944 to be transferred to himself. (R. 327-9.) The stock purchased by Black in 1945 and thereafter held in his lock box, numbering approximately 56,000 shares, was marked "retired" for the purpose of cancelling the advances made by the Company to purchase the stock, thus balancing Black's account with the Company. Since Black at that time held a preponderant majority of the stock in his own name, this purported retirement had substantially the same effect as a direct transfer of the stock to Black. (R. 186-88, 314-15; CR. 1098-99.)

Black then transferred all of his shares, numbering 62,126, to N. C. R. A. for $51.06 per share (R. 388-9), and

[3] Black also received a letter of inquiry from respondent Kenneth D. Constant. Black replied that it would be impossible "to make clear to you the many ramifications of our recent deal" but that he would explain it in person. (R. 342.) Black never did so because he "didn't have time to see them." (R. 345.)

the few stockholders who had retained their shares received the same price per share. (R. 406; CR. 1134-35.) Of a total consideration of $4,420,634.38 paid by N. C. R. A. for Black-Marshall, Black received $3,172,153.56 personally, while members of his family received an additional $347,414.79. (R. 406.) Black then left Kansas to reside in California.

The Legal Actions.

Although Black had been able to sidestep Dr. Wadleigh's inquiry in 1945, respondents, in the spring of 1949, discovered the manner in which they had been victimized. Shortly thereafter Dr. Amen, a citizen of South Dakota, brought suit again petitioners and certain co-defendants in the United States District Court for the District of Kansas. Dr. Amen and five other respondents, some of whom were citizens of Illinois, also brought suit against petitioners and others in a Kansas State court. In both cases Black-Marshall, which was a dissolved Illinois corporation, and other citizens of Illinois were named as defendants. However, petitioners themselves sought and obtained the removal of the state court action to the federal court, alleging that the named defendants who were citizens of Illinois had not been and could not be served, so that the action was wholly one between citizens of different states. (R. 39.)[4]

Prior to trial, all defendants other than petitioners, who are citizens of California, were dismised from the action.[5] Meanwhile, a number of other former stockholders of

[4] Petitioners now refer to their own action in removing the state court suit, which respondents opposed, as "palpable error." (Pet. Br. 6.)

[5] Respondent Amen obtained an order of an Illinois court setting aside the dissolution of Black-Marshall and appointing co-receivers of the company. These co-receivers subsequently brought another action against petitioners and also obtained leave to intervene, as parties plaintiff in the original federal court case brought by Dr. Amen and to dismiss Black-Marshall as a defendant therein. (R. 25-26.)

Black-Marshall whose stock had been acquired by Black filed intervening petitions, which were allowed. The citizenship of the interveners was not alleged or formally proved, but the record leaves no real doubt that diversity exists between petitioners and all the interveners except Mr. and Mrs. Kenneth Constant, who had also moved to California. (R. 137-47.)

In addition to alleging diversity of citizenship, respondents averred that the action arises under the Constitution and laws of the United States. (R. 13.) This allegation was founded upon the claim that petitioners' actions, in addition to constituting common law fraud, violated Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and Rule X-10B-5 of the Securities and Exchange Commission promulgated thereunder. That Rule, which is paraphrased in respondents' pleading (R. 15), makes it unlawful, in connection with the purchase of securities, to use the United States mails or other instrumentalities of interstate commerce to employ schemes to defraud, to make untrue statements of material facts, or to engage in acts or practices which operate as a fraud upon the seller of securities.

Following a trial to the court, the trial judge rendered judgment for the defendants. The court's findings of fact (which adopted petitioners' suggested findings verbatim) recognized that respondents' stock had been acquired by Ives' fraud and had been delivered to Black (R. 124-30); that Black was fully aware of the fact that the shares had been acquired by gross misrepresentations but did nothing to rectify the fraud (R. 130); and that he had reaped an immense personal profit as a result of the fraudulent acquisition of respondents' shares. (R. 131-2.)

The trial court's denial of recovery was based principally upon the finding of fact that Ives' misrepresentations had

been made without Black's solicitation or knowledge (R. 124-7),[6] and upon the conclusion of law that Ives was not Black's agent. (R. 134.) The trial court dismissed the claims based upon Black's fraudulent issuance to himself of 32,457½ shares without explanation. (R. 135.)

The Court of Appeals reversed. It held, upon principles of unjust enrichment, that respondents were entitled to participate in the proceeds of the 1947 sale of Black-Marshall, and that Black's unlawful profits from the sale must be constituted a trust fund in Black's hands as trustee *ex malificio*. The court's conclusions rested upon three grounds: (1) that Ives was Black's agent when he secured respondents' shares and Black was therefore accountable as principal for Ives' fraud; (2) that when Black learned of the misrepresentations by which respondents' shares, then in his hands, had been acquired, it was his duty to restore them; and (3) that Black stood in a position of trust and confidence to respondents, to which he had been unfaithful.

The Court of Appeals concluded, in addition, that since 32,457½ of the shares sold by Black in 1947 had "beyond doubt" originally been issued to him "surreptitiously, covertly and * * * fraudulently," they were not validly issued shares. In its first opinion it assumed that the corporation's receivers would participate on the basis of those shares in the proportionate distribution of the proceeds of the 1947 sale. When the court was advised that this recovery by the receivers might produce an unjustified return of consideration to National Cooperative Refinery Association, the purchaser of Black-Marshall, the court modified its opinion to hold that the invalid shares should not participate at all in the distribution of the proceeds of the 1947 sale.

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[6] This finding seems almost incredible on the record, but in view of the court's other errors it was unnecessary for the Court of Appeals to determine whether this finding should be set aside.

The Court of Appeals remanded the cause to the District Court for distribution of Black's fraudulent profits among the claimants entitled thereto on the basis of their proportionate interests in the proceeds of the 1947 sale as determined in accordance with a formula set forth in the court's opinion. (R. 460.) As will be shown below (*infra*, pp. 22-29) the amount of money to which each claimant is entitled under the formula depends upon the total number of shares entitled to participate in the proceeds of the 1947 sale. And this, in turn, depends upon the number of claimants who are held to have been defrauded of their shares in 1944 and 1945. The claims here involved are thus not separate and distinct claims related solely by common questions of law or fact but are interdependent claims to a common trust fund.

SUMMARY OF ARGUMENT.

I.

Petitioners represented to this Court upon petition for certiorari that this litigation involves a number of separate and distinct claims related solely in the sense that there are common questions of law or fact involved and common relief was sought. They represented specifically that the Court of Appeals had ordered judgment to be entered in accordance with "a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants." Upon the basis of those representations, this Court granted certiorari to consider whether persons asserting claims of that kind may intervene in a federal court action without regard to the citizenship of each intervener.

The question petitioners asked this Court to review is not presented in this case, and respondents take no position with respect thereto. The claims here involv. are not in fact separate and distinct claims related solely by common questions of law and fact but are interrelated and interdependent claims to a fund upon which the court below has impressed a constructive trust. That court prescribed a formula for distribution of the trust fund under which the amount each claimant is entitled to receive depends upon the number of claimants whose claims are sustained. Because of this interdependence, full and complete justice cannot be done unless all claims to participate in the fund are adjudicated in one proceeding.

Petitioners have acknowledged that in cases where the claims are in fact interdependent, persons asserting such claims may intervene without separately establishing diversity of citizenship. They have specifically recognized the soundness of the decision of the Court of Appeals for

the Second Circuit in *Dickinson* v. *Burnham*, 197 F. 2d 973, which so holds.

The question actually presented is thus not essentially one of law but of fact. That question is whether, on the record and under the decision below in this case, the claims involved are entirely separate and distinct claims related solely by common questions of law and fact, as petitioners represented to this Court, or are in fact interdependent claims to the trust fund held by petitioner as trustee *ex malificio*.

On that question, there can be no doubt. The amount per share to which each claimant is entitled depends directly upon the total number of shares held to be entitled to participate in the proceeds of the sale, which depends in turn upon the number of persons whose claims to have been defrauded by petitioners are sustained by the court. A further element of interdependence arises from the fact that Black's unjust enrichment is insufficient to yield each claimant the full amount to which he is entitled, with the result that there must be a pro-rata adjustment of claims.

II.

The holding in *Dickinson* v. *Burnham* that persons asserting interdependent claims to a fund held in constructive trust may intervene without regard to diversity of citizenship or jurisdictional amount in an action properly brought in a federal court is merely an application of long-established principles of ancillary jurisdiction. In such cases as *Stewart* v. *Dunham*, 115 U. S. 61, this Court has recognized that once federal diversity jurisdiction is properly established, the intervention of other claimants having interdependent claims is ancillary to the main cause, and the citizenship of the interveners is irrelevant.

Petitioners fall into error when they assume that the jurisdictional question here presented depends upon whether the case falls within the first, second or third subdivision of Federal Rule 23(a). The jurisdiction of the federal courts depends upon principles that long antedate the Rules. Moreover, on its actual facts this case falls within Rule 23(a)(2), the "hybrid" class category, as the *Dickinson* case holds.

III.

Quite apart from diversity of citizenship, the jurisdiction of the federal court in this case is founded upon the existence of a federal question. Respondents alleged that petitioners' actions, while constituting common law fraud cognizable under state law, also violated Rule X-10B-5 of the Securities and Exchange Commission, which makes it unlawful, in connection with the purchase of securities, to engage in acts which operate as a fraud upon the seller or to make untrue statements of material facts.

It is well established that a private cause of action may be brought under Rule X-10B-5, and that the anti-fraud provisions of the Rule adopt as the federal standard the most liberal common law views as to what constitutes fraud in the purchase or sale of securities. Since a substantial federal cause of action was alleged, there was pendent jurisdiction over the equivalent common law cause of action. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175.

IV.

Petitioners' reargument of substantive questions which were foreclosed by this Court's limitation of the grant of certiorari is improper. Similarly, petitioners' repeated references to "confusion" and "procedural muddle" constitute an obvious pretext for obtaining a broad remand of this case to the District Court, where they hope once

more to renew the substantive arguments which were resolved against them in the Court of Appeals.

Diversity of citizenship exists as to all parties except Mr. and Mrs. Constant. It is conceded that, even apart from the existence of federal question jurisdiction, the Constants' intervention was proper if the claims are interdependent, as the facts prove them to be. It is only on the asserted ground that the Constants' claim is "separate and distinct" from all others that their intervention is attacked. Even if the Constants' claim were to be eliminated from the case on the ground that it is "separate and distinct," by the same token their absence should not deprive all other respondents of their rightful portion of petitioners' fraudulent profits.

ARGUMENT.

I.

THE QUESTION UPON WHICH PETITIONERS SOUGHT CERTIORARI IS NOT PRESENT UPON THE FACTS IN THIS CASE; PETITIONERS HAVE CONCEDED THE APPLICABLE PRINCIPLES OF LAW.

In their petition for certiorari, petitioners represented to this Court that the following jurisdictional question expresses the circumstances of this case:

> "'* * * whether a number of persons asserting separate and distinct demands as to which there were some common questions of law and fact, may intervene in a proceeding in a federal court, regardless of the citizenship of each intervenor or other jurisdictional requirements, as the Court of Appeals held they might do, merely because the original plaintiff in this so-called spurious class action possessed the requisite jurisdictional requirements, including diversity of citizenship."

This Court was persuaded to grant the writ upon the basis of that representation. 352 U. S. 888.

Having obtained certiorari upon the question thus stated, petitioners make no effort to justify their representation as to the facts of this case. Instead they embark directly upon a debate with Professor James William Moore over his position that members of the class may be permitted to intervene in a class action under Rule 23(a)(3) without establishing independent jurisdictional grounds "even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved." 4 Moore's *Federal Practice* (2nd Ed.) 137. Petitioners argue that to permit intervention without re-

gard to citizenship in an action which "presents only a series of separate and distinct claims related *solely* in the sense that there is a common question of law or fact involved" (Pet. Br. 23-24) would effect an unwarranted extension of federal jurisdiction by means of a procedural rule.

Petitioners do not fully disclose or meet Professor Moore's countervailing arguments.[7] However, it is unnecessary for respondents to take any position with respect to this question because, as we shall show, this action is *not* one involving "separate and distinct claims related solely in the sense that there is a common question of law or fact involved." On the contrary, this action actually involves interrelated and interdependent claims to a common fund. With respect to a case of that kind, petitioners concede the propriety, under prior decisions of this Court, of permitting the intervention of multiple claimants without requiring each independently to establish jurisdictional grounds. Indeed, respondents submit that this case is precisely analogous in all matters here material to *Dickinson* v. *Burnham*, 197 F. 2d 973 (2nd Cir.), *cert. den.* 344 U. S. 875, in which the court also permitted intervention without regard to citizenship. In their reply brief on certiorari, petitioners conceded that that decision was correct in view of the interdependent nature of the claims there involved. They omit any discussion of the *Dickinson* case from their present brief despite reliance upon that decision by the court below, and the emphasis it received in the briefs upon the petition for certiorari.

There is thus little real dispute between the parties over the principles of law applicable in this area of federal jurisdiction. Petitioners are committed to the position that if this action involves interdependent claims, as in

[7] The gist of this controversy is briefly stated in an appendix hereto, *infra*, pp. 59-61.

Dickinson v. *Burnham*, the court had jurisdiction to deal with the claims of all intervening claimants irrespective of their citizenship. Thus, the question is not whether interveners having separate and distinct claims related solely by a common question of law or fact must separately satisfy jurisdictional requirements, as petitioners represented to this Court on petition for certiorari, but whether the claims involved in this case are *in fact* of that kind or are, on the contrary, interdependent claims of the kind traditionally decided by federal courts in the exercise of ancillary jurisdiction.

This question depends, of course, upon the facts of record—the type of relief sought and granted, the pleadings, the proof, and an analysis of the decision of the court below. All of these matters petitioners studiously ignore. Instead, they rely solely and expressly upon the fact that the court below stated that this is a "spurious" class suit maintainable under Rule 23(a)(3) as establishing that the claims here involved are "separate and distinct claims related *solely* in the sense that there is a common question of law or fact involved and common relief is sought."

Entirely on this basis petitioners seek to place respondents and the Court of Appeals squarely in Professor Moore's camp; they make him "the architect of respondent's case" (Pet. Br. 18); and assert that the decision below "rests on a theory advanced by Professor Moore." (Pet. Br. 21.) Having by this means introduced into this case a legal controversy between themselves and Professor Moore, petitioners carefully avoid any reference to the facts of the case and argue that question in a total factual vacuum.

When the facts of this case are considered, it becomes apparent that there is much more here than merely common questions of law and fact; there is an interrelation

among claims to a trust fund which must be distributed by a single court. Why, then, did the court below refer to this as a "spurious" class suit?

The statement of the Court of Appeals with respect to the class suit issue was not made in the context of the question raised here; it was made in direct response to a different argument by petitioners, which is completely inconsistent with their present contention. Petitioners contended in the Court of Appeals that the frauds committed against respondents did not justify a class action under Rule 23(a)(3) for the reason, it was claimed, that respondents had not been defrauded by the use of a common communication or through misrepresentations made at a single meeting. Petitioners' jurisdictional argument was that *because* the action was not a proper "spurious" class suit under Rule 23(a)(3), it was necessary for each intervener to show diversity of citizenship.[8] They did not contend, as they do here, that each intervener must individually fulfill federal jurisdictional requirements *even though an action is a proper spurious class suit.* On the contrary they conceded that there was no such requirement in a proper spurious class case, while contending that this was not such an action.[9] At that time, in short, pe-

[8] Petitioners admit in their brief in this Court that that was their argument below (Pet. Br. 16, note 8):

> "In the Court of Appeals, petitioner renewed this argument and emphasized that the litigation did not present the type of situation falling within Rule 23(a) (3), and *therefore* each respondent's case 'must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved.'"

[9] Actually, the issue never was deemed important in the Court of Appeals. Petitioners' sole argument on the point consisted of two pages, beginning at page 86, in a brief of 146 pages. Petitioners' statement that their jurisdictional contention was "brushed aside" by the court below (Pet. Br. 9) is thus wholly gratuitous, particularly in view of the fact that their contention below was not the one now urged in this Court.

tioners accepted Professor Moore's opinion with respect to the issue they would now so hotly debate.

To meet petitioners' limited argument that this action did not meet the requirements of a spurious class suit, it was necessary only to show that common questions of law or fact sufficient to satisfy Rule 23(a)(3) were presented. It would have been purely a labor of supererogation to go farther, since petitioners at that time conceded the jurisdiction of the court over all interveners if the action were held to be a spurious class suit. In answer, therefore, respondents confined themselves to pointing to the existence of sufficient common questions of law and fact.

No one suggested to the Court of Appeals that jurisdiction over the interveners was in doubt if this action met the "common question of law or fact" test of Rule 23(a)(3). No one then argued that Professor Moore errs on this point.

As to the contention that the complaint alleged individual frauds involving different statements made at different times and therefore did not come within Rule 23(a)(3), the Court of Appeals held that the misrepresentations were made to effectuate "a scheme to defraud the stockholders of Black-Marshall" (R. 442), and therefore clearly presented sufficient common questions of law or fact to satisfy Rule 23(a)(3) as, of course, they did.[10] Thus, having found common questions of law and fact sufficient to satisfy the requirements of Rule 23(a)(3), the court simply concluded, as Moore stated and *as petitioners then*

[10] The Court of Appeals concluded further that the misrepresentations were made "in pursuance of a definite plan to eliminate the large family of stockholders, including the Aledo Group, and to acquire the stock or a majority of it in the effectuation of that plan" (R. 448) and that "the credited testimony of the witnesses indisputably shows a general pattern of action into which all of the Aledo Group of appellants fall with only insignificant factual variance". (R. 452.)

conceded, that the interveners need not separately meet federal jurisdictional requirements.

It is evident that to dispose of petitioners' jurisdictional argument in the Court of Appeals it was enough to find the claims involved in this action to be related in the sense of having some questions of law and fact in common. It was not necessary even to consider whether they are related in any other sense as well. The Court of Appeals cannot, therefore, be deemed to have decided that the claims involved in this action are related *solely* in the sense of having questions of law or fact in common. Indeed, its formula for distribution of the trust fund specifically recognizes the interdependence of the claims and makes provision therefor.

In the petition for certiorari, no effort was made to substantiate the contention that the claims of the parties are separate and distinct claims having only some questions of law and fact in common by any discussion and analysis of the facts. In respondents' brief in opposition to that petition it was pointed out that, far from being related solely in that there are common questions of law and fact, the claims in this case are in fact inextricably interdependent, the recovery on each claim depending upon the disposition of every other claim. In their reply brief petitioners again avoided an analysis of the facts, choosing to meet respondents' contention with the bald assertion that the judgments to be entered as a result of the opinion of the Court of Appeals are based on "*a formula resulting in the same fixed, absolute amount to each claimant regardless of the number of claimants.*" (Reply Brief on certiorari, p. 5.) This vital assertion could not have been supported by reference to the record but is directly and indisputably contrary to the record, as we shall show below.

In their brief on the merits, petitioners again make no

attempt to demonstrate the truth of this crucial representation. Indeed, they carefully avoid any discussion of the real nature of the claims in this case or their disposition by the court below. They accomplish this by simply reiterating that the Court of Appeals referred to this as a class action under Rule 23(a)(3), without mentioning that this statement was made in response to the very different argument made by petitioners in that court.

Quite apart from its unfairness to the court below, petitioners' presentation has the effect of diverting this Court's attention from the real nature of the claims here involved and the disposition of the case by the Court of Appeals.[11] We propose to point out now the facts which demonstrate that the claims here involved are interdependent claims to a common trust fund.

A. The Claims Here Involved Are Interdependent Claims to a Common Trust Fund Subject to Court Control.

In their original and amended complaints, respondents prayed, on behalf of all shareholders similarly situated, that they be restored to their rights, titles and interests as shareholders of Black-Marshall; that all such shareholders receive their proper and lawful distributive shares of the purchase price of the property of Black-Marshall transferred to N.C.R.A.; and that:

> "* * * the plaintiff and all other such shareholders be adjudged the equitable owners, as their interests may appear, of all said shares and properties, that the defendants be decreed to hold all such shares and

[11] A comparable situation was presented in *System Federation No. 91* v. *Reed*, 180 F. 2d 991, 996, where the court concluded that the facts made the action a true class suit although only a spurious class suit had been alleged. The court said with respect to this allegation: "This would indicate a claim based upon a right of a several character; but that was not the substance of the complaint, and it is the substance which controls."

properties in trust for the plaintiff and such other shareholders, and that the defendants be ordered and decreed to pay to the plaintiff and such other shareholders, as their interests may appear, all sums to which in justice and equity they may be entitled, * * *." (R. 19.)

Upon appeal the court below, after determining that Black had defrauded respondents, held "the former stockholders entitled to participate in the fund which equity has created by raising a trust and constituting Black as trustee therefor *ex malificio.*" (R. 455.) The court said:

"In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less of course the amounts heretofore paid on the sale price in 1944 and 1945." (R. 451.)

* * * * * *

"Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages. In these circumstances, equity will impress a trust upon the stock and constitute Black a trustee for the profits he reaped from the date he received it until he finally sold it or retired it." (R. 452.)

The court specifically recognized that in the determination and distribution of Black's unlawful profits, it was necessary to make a proper allocation of the proceeds of the 1947 sale among the equitable stockholders of Black-Marshall. For this allocation it prescribed the following formula:

"To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence the following formula: First, inquiry must be

made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amount paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

"Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transaction and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (R. 460.)

Petitioners declared in their reply brief on certiorari, as we have already noted (*supra*, p. 21), that this formula merely involves an arithmetical computation; that it results in the same fixed, absolute amount to each claimant regardless of the number of claimants or the disposition of their claims. It follows, say petitioners, that each respondent's claim is wholly independent of the claim of any other, the only connection between the claims lying in the existence of common question of law and fact.

The error in petitioners' argument is that its premise is simply untrue as a matter of fact. *The amount to which each claimant is entitled under the court's formula in fact depends directly and necessarily upon the disposition of the other claims presented.* This fact may readily be demonstrated.

Petitioners seem to assume that the application of the

Court of Appeals' formula simply requires that a fixed total sales price be divided by a fixed number of shares to arrive at a dollar per share figure, which may then be applied to determine the allocable portion of each claimant. This is not correct. The total number of shares *nominally* outstanding in 1947 is a fixed quantity. But the number of shares which were *equitably* outstanding and entitled to participate in the proceeds of the 1947 sale is a variable figure depending upon the disposition of individual claims.

This is because of the fact that after acquiring a large number of shares from respondents and others in 1944 and 1945, Black retired a substantial portion of the outstanding stock of Black-Marshall. As a result, the number of shares nominally outstanding at the time of Black's sale to N.C.R.A. in 1947 was substantially less than the number of shares that had been outstanding at the time of the fraud upon respondent in 1944 and 1945. Included among the retired shares were shares of which various persons claimed to have been defrauded. In order to determine how many shares were *equitably* outstanding in 1947 and therefore entitled to participate in the proceeds of Black's sale, it was necessary to determine the number of those shares which were fraudulently acquired and arbitrarily retired and were therefore entitled to be reinstated. For this reason, it was impossible to dispose fully or equitably of any one claim without also disposing of the others.

Respondents' claims against the fund which came into Black's hands in payment of the shares equitably owned by them are interrelated in another respect. This arises from the fact that, prior to purchasing respondents' shares, Black fraudulently issued 32,457.50 shares of Black-Marshall stock to himself. The court held this to be "a promoter's illegal, secret profit" (R. 454) and stated that it is "clear beyond doubt that it was issued surreptitiously, covertly, and we say fraudulently to Black." (R. 458.) Since the court below concluded that

these fraudulently issued shares were not entitled to participate in the proceeds of the sale to N.C.R.A., it directed that the 32,457.50 shares be subtracted from the number otherwise found to be equitably outstanding in 1947 and thus entitled to participate in the distribution of the trust fund.

The Court of Appeals pointed out that when equity has raised a trust, the beneficiaries of the trust fund have a right to contest the claim of any one else to participate in the distribution of the fund. Here, therefore, the persons who were equitable stockholders of Black-Marshall at the time of the sale to N.C.R.A. had a right to demand that the 32,457.50 shares of stock fraudulently issued to Black should not be permitted to participate in the proceeds of the sale. That right was common to all such stockholders, and the relief granted—exclusion of the fraudulently issued shares from participation in the proceeds — was of common benefit to all. (See opinion of Court of Appeals, R. 455.)

The Court of Appeals' formula was carefully designed to give effect to the fact that the amount which each claimant is entitled to recover under the court's decision depends not only on the disposition of his own claim, but also on the disposition of those of the other claimants. The value per share of each claimant's right cannot be determined until, by disposition of all claims, the court ascertains how many shares must be reinstated because "arbitrarily retired by Black" after their fraudulent acquisition, and the total is then reduced by the 32,000 shares fictitiously issued to Black.

The interdependence of claims in this case is graphically illustrated by the chart opposite showing the variation in per-share allocation of the proceeds of the 1947 sale depending upon allowance or disallowance of various individual claims.

INTERDEPENDENCE OF THE CLAIMS INVOLVED HEREIN AS ILLUSTRATED BY THE EFFECT UNDER THE COURT OF APPEALS FORMULA OF VARIATIONS IN THE DISPOSITION OF INDIVIDUAL CLAIMS.[1]

	1	2	3	4	5
	Distribution Made in 1947	Equitable Distribution			
		If Claims of All Parties in District Court Had Been Upheld	As Claims Disposed of by the Court of Appeals	If Amen, Baldwin, E. Hall and Constants Claims Had Not Been Upheld	If Claim of Amen Alone Had Been Upheld
I. Total proceeds subject to distribution	$4,420.634.38	$4,420,634.38	$4,420,634.38	$4,420,634.38	$4,420,634.38
II. Nominally outstanding shares which participated in 1947 distribution	86,577.75				
III. Total valid shares entitled to participate in distribution					
Valid nominally outstanding shares[2]		54,119.75	54,119.75	54,119.75	54,119.75
Arbitrarily retired shares required to be reinstated		33,606.00	31,311.00	27,576.00	80.00
Total shares entitled to participate in distribution		90,855.75	85,430.75	81,695.75	54,199.75
IV. Distributive amount/share	$51.06	$48.66	$51.75	$54.11	$81.56

[1] The adjustments required by the Court of Appeals formula to reflect the payments made to defrauded shareholders in 1944 and 1945 are not included in these computations.

[2] Shares nominally outstanding in 1947 (86,577.25) less shares fictitiously issued to Black (32,457.50).

As this chart shows, petitioners' quarrel here is not with Professor Moore, but with the plain arithmetic of the Court of Appeals' formula.

The distribution of the purchase price to the shares nominally outstanding in 1947 amounted to $51.06 per share, as shown in the first column. But it is equitably necessary to reduce the nominally outstanding shares by the 32,000 shares secretly issued to Black and, on the other hand, to increase the shares nominally outstanding by reinstating the shares fraudulently obtained and then retired. If only Amen had established the basis for recovery, the resulting distributive amount per share would have been $81.56, as shown in line IV, column 5. Taking the other extreme, if the claims of all parties in the District Court had been upheld, the per share amount would have been $48.66, shown in line IV, column 2. Other variations are indicated in columns 3 and 4. This, we submit, is a factual demonstration that the claims here are not separate and distinct but interdependent and, therefore, that the record does not present the question which this Court granted certiorari to decide.

The claims are interrelated in still another respect. Since respondents must look to the trust fund consisting of Black's unjust enrichment for payment of their claims, and since Black's friends who continued to hold stock in Black-Marshall until 1947 received a part of the benefit from Black's unlawful retirement of respondents' stock, it is apparent that, apart from interest, the fund will be insufficient to pay respondents the full value of their stock as determined by application of the formula. Respondents' claims will therefore require pro-rata adjustment, which constitutes another element of interdependence between the claims here involved.

Accordingly, the factual situation now before the Court is this: Federal jurisdiction of the action as originally

brought is admitted. Dr. Amen's action sought to recover, on behalf of all members of the class of defrauded stockholders, their allocable shares of Black's unjust enrichment from the subseqnent sale to N. C. R. A. The Court of Appeals held Black to be a trustee *ex maleficio* with respect to his unlawful profits and directed the district court to distribute the trust fund on the basis of a prescribed formula. That formula took into account the fact that the number of shares equitably outstanding in 19[illegible] and therefore entitled to participate in the proceeds of the sale, depends upon the determination of the claims of all former stockholders whose shares were acquired by Black and then retired or sold to N. C. R. A. It also took into account the fraudulent issuance by Black of over 32,000 shares to himself. In short, this case presents a classic example of such interrelation among claims to a common fund that the equitable and final disposition of any claim depends on the disposition of all others.

B. This Case Is Indistinguishable in Principle from Dickinson v. Burnham, Which Petitioners Concede to Be Correct.

Since on its facts this is not an action involving separate and distinct claims related solely by the presence of common questions of law and fact, the jurisdictional contention on which petitioners rely and which this Court has granted certiorari to consider, whatever may be its merit, has no application whatsoever to this case.

Moreover, when petitioners' jurisdictional argument is applied to the actual facts of this case, it affirmatively demonstrates the correctness of the action of the courts below in permitting intervention herein without regard to citizenship. We shall show in a succeeding section of this brief that on its actual facts, as opposed to those errone-

ously assumed by petitioners, this case clearly comes within the prior decisions of this Court conceded by petitioners to have upheld intervention in actions based on diversity without regard to the citizenship of each intervenor. Before doing so, however, it is appropriate to consider a recent decision of the Court of Appeals for the Second Circuit, both because it is indistinguishable from this case on its facts and because petitioners have expressly conceded its correctness under the prior decisions of this Court. That case is *Dickinson* v. *Burnham*, 197 F. 2d 973.

The *Dickinson* case involved a claim advanced by two interveners in a pending action, both of whom established requisite diversity of citizenship. They sued on behalf of a class consisting of a group of persons who had contributed $600,000 to the so-called "Rinke Agency," which had been formed to attempt to overcome the financial difficulties of a corporation of which the subscribers were all stockholders. The action was brought to recover secret profits fraudulently received by the original plaintiff, Dickinson, as a result of buying corporate property at a foreclosure sale and then reselling it to the Rinke Agency at double the amount paid by him. The interveners sought, on behalf of the class, to recover from Dickinson the proceeds of the fraud, which should then be divided among the contributors to the Rinke Agency in proportion to their contributions.

After trial, the district court upheld the right of the members of the class to recover the proceeds of the fraud, amounting to $176,245.24 plus interest, but postponed entry of a final decree to permit other members of the class to intervene and establish their individual claims. The known members of the class were notified, and those who applied were allowed to intervene without regard to their citizenship and to prove their claims. The court then entered a final decree dividing Dickinson's unjust enrichment from

the fraud among the claimants in proportion to their respective contributions to the Rinke Agency.

Upon appeal it was contended that the district court had erred in allowing the intervention of the members of the class without regard to citizenship. But the Court of Appeals, speaking through Judge Clark, pointed out that the proceeds of the fraud in the hands of Dickinson[12] constituted a constructive trust fund which required proportionate distribution among the members of the class on the basis of their respective interests in the Rinke Agency. The Court said:

> "* * * By taking charge of the fund as it did, [the district court] afforded all necessary protection to the plaintiff while making a fair distribution to the actual parties in interest. And the result seems not merely practical, but legally sound.
>
> "For what we have here is property held in constructive trust by reason of fraud perpetrated upon those who made the original contributions. * * *" (197 F. 2d at 980.)

The Court therefore concluded with respect to the question of jurisdiction over the intervening claimants:

> "* * * The court found the diverse citizenship of the original parties and the interveners Burnham and Vaughn. This is sufficient for our purposes. *Townsend* v. *Bucyrus-Erie Co.*, 10 Cir., 144 F. 2d 106, 108. And it gave jurisdiction for adjudication of the issues between the class and the plaintiff and his co-conspirator, irrespective of citizenship of the subsequent interveners; the later distribution of the fund was merely an ancillary step in administration. * * *" (*Ibid.*)

The parallel between the facts of that case and this is apparent and striking. The class in the *Dickinson* case

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[12] Dickinson, the plaintiff in the original action, was one of the two persons found to have defrauded the Rinke Agency subscribers in the class action brought by the interveners.

consisted of persons who had contributed money to the Rinke Agency; here, it consists of persons who were stockholders in Black-Marshall. In both cases, the courts impressed a trust upon the proceeds of fraud in the hands of the fraudfeasor. In both cases the claims are interdependent, since the amount each claimant is entitled to recover from the fund depends upon the number of claimants whose claims are allowed by the court. And in both cases, the proportionate share of each claimant in the total recovery is based upon his proportionate financial interest in the enterprise (*i. e.*, the Rinke Agency in the one case, and Black-Marshall in the other). It is difficult to imagine two cases in a field necessarily involving complicated fact situations that are more nearly alike in all circumstances relevant to the question before the Court.[13]

Petitioners' treatment of the *Dickinson* case provides an interesting insight into their approach to this case. In their reply brief on certiorari (they do not now discuss the case in their brief on the merits), petitioners conceded that *Dickinson* was correctly decided in view of the "interdependent nature of the claims." (Reply Brief on certiorari, p. 5.) But in this case, petitioners said, the claims are not interdependent and involve nothing more than common questions of law and fact. As has been noted, they supported that representation with the assertion—without reference to the record—that the formula for recovery adopted by the court below is "a formula resulting in the same fixed,

[13] The fact that intervention of the non-diverse claimants in the *Dickinson* case occurred after judgment rather than prior to judgment, as in this case, is of course immaterial, as petitioners have recognized (Pet. Br. 22). This Court held in *Stewart* v. *Dunham*, 115 U. S. 61, 64, that: "* * * it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter cause had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

absolute amount to each claimant regardless of the number of claimants." (*Ibid.*)

We have already shown that this representation, which was vital to petitioners' attempted distinction of the *Dickinson* case, is simply untrue as a matter of fact. The claims here involved *are* interdependent. The amount which each claimant will receive cannot be fixed independently but depends upon the disposition of the claims of others who allege themselves to be equitable stockholders of Black-Marshall as of the date of the sale to N. C. R. A. in 1947. In short, petitioners attempted to distinguish the *Dickinson* case on a factual basis that is flatly disproved by the record.

Petitioners also attempted to distinguish *Dickinson* on other grounds that are patently and demonstrably untenable. They stated, for example, that the court had held in that case that non-intervening members of the class "would be bound by the judgment and so need not prove diversity of citizenship in order to come in to preserve their rights." (Reply Brief on certiorari, p. 4.) In fact, the court specifically *declined* to rule on that question, stating:

> "But we need not attack that interesting problem here. Our question is not the effect as *res judicata* of the judgment entered, but how far Dickinson can object to a transfer of the entire fund from his hands." (197 F. 2d at 979.)

Moreover, this "distinction" merely states a legal conclusion which, in view of the obvious factual similarity between the two cases, would be equally applicable here.

Petitioners next stated, without attempting to explain its significance, that the interveners in the *Dickinson* case sued not as stockholders, but as subscribers to the Rinke Agency Fund. (Reply Brief on certiorari, p. 4.) The un-

stated inference petitioners apparently ask the Court to draw is that the *Dickinson* case involved the restoration of a trust fund already within the jurisdiction of the court. But again, the facts are to the contrary. As the district court in the *Dickinson* case stated:

> "The claims pleaded by the original claimant-interveners against Dickinson sounded in fraud. Although all the interveners herein were the *cestuis* of a trust (the Rinke Agency Fund) the action is not, strictly speaking, one to restore a trust fund. The delinquent trustee is not a party to the action and the trust, as such, terminated, for all practical purposes, before the claims herein were filed." (11 Fed. Rules Serv. 489, 492.)

The Court of Appeals also emphasized the fact that the trust fund to be distributed was not the Rinke Agency Fund but the proceeds of the fraud perpetrated by Dickinson, which were held to constitute a trust fund in his hands. Here, on identical principles and using very similar language, the court below, citing the *Dickinson* case (R. 442), held the proceeds of Black's fraud to be a trust fund to be distributed to those equitably entitled thereto. The fact that in one case the members of the class were persons who had at one time contributed to a business trust and in the other case were persons who had been stockholders in a dissolved corporation is wholly immaterial.

Finally, petitioners stated categorically that the claimants in this case are somehow to be paid "in full" on an "ordinary tort liability for defrauding," whereas in the *Dickinson* case the claimants received something less than "full recovery". (Reply brief on certiorari, p. 5). This simply is not the case. In both instances the claimants sued for exactly the same thing—their proportionate shares in the proceeds of the fraud committed upon them. In neither case, contrary to petitioners' argument, was re-

covery sought on an ordinary tort damage theory. As the Court of Appeals expressly stated in this case:

> "In equity the stockholders remain the owners of their shares with the right to participate in the proceeds of the sale in the proportion that their stock ownership bears to the total stock entitled to participate in the assets of the company at the time of sale, less, of course the amounts heretofore paid on the sale price in 1944 and 1945." (R. 451.)
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> • • • • • •
>
> "*Recovery is predicated upon the equitable principle of unjust enrichment, not upon the theory of provable damages.*" (R. 452.)

Black's unjust enrichment, on which the Court of Appeals imposed a constructive trust, is in fact less than the total loss sustained by respondents, and, therefore, the *pro rata* recovery of each will be less than the amount of his loss. The reason for this is that the arbitrary retirement of respondents' shares operated to increase the per share distribution received by some of Black's friends, who had retained a substantial number of shares, upon the sale of the company to N. C. R. A. in 1947. Black's fraud was responsible for this windfall to these persons, but the increase in the amount they received for their shares did not accrue to Black, and it is not reflected in his unjust enrichment, which constitutes the fund to be distributed under the opinion of the Court of Appeals.

Despite the most tortuous twistings and turnings, petitioners cannot escape the precise analogy of the *Dickinson* case. That decision is the more significant because the conflict of decisions relied upon in their petition for certiorari here was with an earlier Second Circuit decision, *Steele* v. *Guaranty Trust Co. of New York*, 164 F. 2d 387, which in fact involved separate claims presenting solely common questions of law and fact. It is thus evident that that court recognizes and differentiates between cases involving interdependent claims to a common trust fund and

cases involving nothing more than common questions of law or fact. That this case is of the former kind has been shown.

C. The Writ Should Be Dismissed as Improvidently Granted.

The question upon which this Court granted certiorari was whether a number of persons "asserting separate and distinct demands as to which there were some common questions of law and fact" may intervene in a federal court proceeding regardless of the citizenship of each intervener.

We have demonstrated, however, that those are not the actual circumstances of this case but that, on the contrary, this case involves highly interdependent claims to a fund held by Black as a trustee *ex malificio*. Petitioners' jurisdictional contention does not even purportedly apply to the actual facts. Indeed, they have expressly conceded the propriety of allowing interventions without regard to citizenship in circumstances indistinguishable from those actually involved in this case.

Under similar circumstances this Court has dismissed the writ as improvidently granted. In *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, for example, it was alleged in the petition that a lower court decree would deprive petitioner of his property without due process of law. After argument this Court dismissed the writ, stating:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto." (263 U. S. at 509.)

It is respectfully suggested that similar considerations should lead to dismissal of the writ in this case.

II.

THE EXERCISE OF ANCILLARY JURISDICTION OVER INTERDEPENDENT CLAIMS IS AN HISTORICAL FUNCTION OF COURTS OF EQUITY.

A. This Court and the Federal Courts Generally Have Long Permitted Intervention Without Regard to Diversity in Cases of This Kind.

Referring to *Strawbridge* v. *Curtiss*, 3 Cranch 267, for the rule that "in diversity cases involving multiple parties complete diversity of citizenship must exist between all parties, with each individually meeting federal jurisdictional requirements," petitioners assert that the court below has "swept aside the established law of a century and a half." (Pet. Br. 10-11, 14-15.) Standing alone this striking statement seems to imply that never before in 150 years have non-diverse parties been permitted to intervene in an action which has been brought into a federal court on the basis of diversity. Petitioners' argument as a whole discloses that all they really mean to say is that never in 150 years have non-diverse parties been permitted to come into diversity actions merely because their claims and the claims already before the court have some questions of law or fact in common. Later in their brief they acknowledge the existence of the long line of decisions, of which the *Dickinson* case is a recent example, holding that federal courts may in proper circumstances allow ancillary interventions, without regard to citizenship, in cases properly before them on the basis of diversity among the original parties. It is appropriate briefly to review some of those decisions to emphasize the fact that the allowance of intervention in this case is supported by a consistent practice extending back through the entire history of the federal court system. It is this body of law which has forced petitioners to stake their fur-

ther resistance to the judgment below on the hypothesis that the claims in this action involve only common questions of law and fact (Pet. Br. 23, 24).

One line of cases which illustrate the principle are the decisions involving creditors bills or analogous claims. Such actions were typically brought by one or more creditors of a particular debtor on behalf of all such creditors against the fraudulent transferee of the property of their debtor or against third persons as to whom their debtor owned choses in action. Diversity of citizenship between the original plaintiff creditors and the defendant transferees or debtors was essential to federal jurisdiction. But once the action had been instituted, other creditors were permitted to intervene without regard to diversity of citizenship on the ground that their participation was necessary for a proper distribution of the amount recovered and therefore ancillary to the adjudication of the original action. As this Court said in the leading case of *Stewart* v. *Dunham*, 115 U. S. 61, 64:

> "The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill."[14]

Similar principles were followed in *Handley* v. *Stutz*, 137 U. S. 366, which involved the question of jurisdictional amount. There, three creditors of a corporation brought

[14] The principle that a dependent or ancillary proceeding could be brought in a federal court having jurisdiction of the original cause irrespective of diversity of citizenship was early established. *Freeman* v. *Howe*, 24 How. 450; *Krippendorf* v. *Hyde*, 110 U. S. 276.

a diversity action on behalf of all creditors against a number of its stockholders alleging that the corporation was insolvent and that the defendants owed unpaid subscriptions on their stock. Plaintiffs sought to have the unpaid subscriptions owed by the defendants declared a trust fund to be distributed among the creditors. While the original plaintiffs each claimed in excess of the required jurisdictional amount, the claims of many of the creditors who came in later were for less than that amount. But this court sustained the jurisdiction of the circuit court as to all such claims, stating:

> "The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2000, the Circuit Court had jurisdiction of the case, and authority to administer and distribute the amounts, due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master." (137 U. S. at 369.)

Again, in *Trustees of the Wabash and Erie Canal Co. v. Beers,* 2 Black 448, a lien creditor of a canal project brought suit on behalf of all holders of the first series of its bonds seeking the application of the property of the canal to payment of the bonds, which were in default. This court held that the action was proper as to parties, stating:

> "The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bond-holders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to ascertain who these bond-holders are, about which we presume there will be little difficulty, and to notify them to

> come in and share in the fruits of the decree, on paying their proportion of its expense." (2 Black at 457-8.)

See also, *e. g., Richmond* v. *Irons,* 121 U. S. 27, 51-55; *French* v. *Gapen,* 105 U. S. 509, 525-526; *Morgan's L. & T. R. Co.* v. *Texas Central Ry. Co.,* 137 U. S. 171, 200-202; *Myers* v. *Fenn,* 5 Wall. 205, 207; *Phelps* v. *Oaks,* 117 U. S. 236, 240-241.

The reason for the exercise of such ancillary jurisdiction is clear. When the court has subject to its control and disposition a sum of money or property as to which there are a number of claimants, full equity and complete justice cannot be done unless all persons who have claims against the fund are permitted to assert those claims and to receive their proper distributive shares of the amount subject to disposition by the court.[15]

This court and the federal courts generally have applied this principle in a variety of situations. In *Leary* v. *United States,* 224 U. S. 567, for example, this court, speaking through Mr. Justice Holmes, held that in an action to charge the defendant with a trust in respect of funds obtained by him through fraud, a third person claiming an interest in the funds was entitled to intervene in the proceedings as of right. Again, in *Barnes* v. *Alexander,* 232 U. S. 117, 122, this Court upheld the right of one having an "inchoate" right to a fund to intervene in an action to establish the fund.

The principle enunciated in *Stewart* v. *Dunham, supra,* was made the basis for decision in a leading case involving class suits. *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356. There, a class action had been brought by certain

[15] As Professor Chafee once put it: "The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." Chafee, *Some Problems of Equity* (1950), p. 169.

Class A certificate holders of the defendant society on behalf of all such holders attacking a plan of reoganization of the society and seeking to enjoin the allegedly unlawful use of its funds. This Court held that, federal jurisdiction having been established by the original plaintiffs, the subsequent intervention of non-diverse members of the class as co-complainants would not have defeated jurisdiction, stating:

> "'* * * The parties and the subject-matter are within the court's jurisdiction. * * * The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.'" (255 U. S. at 367.)

The ancillary jurisdiction of the federal courts to consider and dispose of claims to funds subject to the court's control has frequently been applied in the lower federal courts as well. In *Peckham* v. *Ronrico Corp.*, 211 F. 2d 727 and *Peckham* v. *Family Loan Co.*, 212 F. 2d 100, for example, the Courts of Appeals for the First and Fifth Circuits respectively recently upheld the right of the representative of the creditors of two debtors to intervene in actions to recover assets of the debtors fraudulently concealed from such creditors in the hands of the defendant corporations. In the latter case the court said:

> "Both proceedings look to the ultimate liquidation and distribution of the properties or their proceeds between the creditors of both institutions, and contemplate their being drawn ultimately into the possession and control of the court below. * * * If it should turn out, as a result of such a trial, that the operations of Sol Meyer and Ferd Meyer [the debtors] were as fraudulent as claimed by complainant and the

intervenor, then the court may be called upon to exercise its equity powers in attempting to unravel and repair the wrongs thus charged." (212 F. 2d at 106-7.)[16]

Petitioners' position with respect to this body of law again emphasizes the fact that the parties are not in substantial disagreement as to the law but only as to the interdependent nature of the claims here presented. Petitioners recognize, for example, that under *Stewart* v. *Dunham, supra*, "all members of the class having claims, regardless of their citizenship, are entitled to the benefit of the decree adjudicating rights in the fund or other property under the court's control." (Pet. Br. 22.) But they reiterate that this is not a case of that kind but rather is one presenting only "separate and distinct claims related solely in the sense that there is a common question of law or fact involved and common relief is sought." (Pet. Br. 23-24.) As we have shown, the claims in this case are not of that character, but, on the contrary, require ancillary administration for precisely the same reasons as in the *Stewart* and *Dickinson* cases.

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, to which petitioners make repeated reference, is of no aid to them for the reason just stated. It involved an attempt by the original parties to an action to aggregate their claims for the purpose of satisfying the jurisdictional amount requirement even though such claims were wholly separate and distinct, each independent of the other. Most significant is the fact that this Court specifically recognized and distinguished a situation of the kind here presented. The then Mr. Justice Stone carefully pointed out (at p. 590, note 2):

"A different question is involved in the case of a

[16] Under related principles this Court held that no independent federal jurisdiction need be shown to support a compulsory counterclaim. *Moore* v. *New York Cotton Exchange*, 270 U. S. 593. See also *Walmac Company* v. *Isaacs*, 220 F. 2d 108 (1st Cir.).

> creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount. *Lyon Bonding Co.* v. *Karatz*, 262 U. S. 77. But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court. *Gibson* v. *Shufeldt*, 122 U. S. 27; *Handley* v. *Stutz*, 137 U. S. 366; *National Bank of Commerce* v. *Allen*, 90 F. 545, 555-556."

Clark v. *Paul Gray* may aid petitioners in their controversy with Professor Moore, but it has no possible application here.[17]

Petitioners faintly suggest (Pet. Br. 24-25) that, whereas *Stewart* v. *Dunham* involved a fund within the court's jurisdiction, the instant case does not, and they quote Mr. Justice McReynolds' statement that:

> "• • • no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Fulton National Bank* v. *Hozier*, 267 U. S. 276, 280.

Since petitioners drop the matter at that point, it is difficult to understand the basis for the distinction they purport to draw. Here, the court below, in accordance with respondents' prayers, impressed a trust upon the unlawful profits of Black's fraud and constituted him a trustee *ex maleficio*. There is thus a distinct fund subject to the jurisdiction of the court, which must be dis-

[17] *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F. 2d 687 (2nd Cir.), which petitioners cited in their reply brief on certiorari but not in their brief on the merits, does not aid them, as petitioners now apparently recognize. That case involved what the court referred to as "plainly a series of separate and distinct claims," which were not "transmuted into a 'single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone." (217 F. 2d at 695.)

tributed to the claimants in accordance with a prescribed formula.

We doubt that petitioners are contending that ancillary jurisdiction is appropriate only if the fund is locked in the registry of the court or is in the custody of a marshal or otherwise physically within the custody of the court. In the *Dickinson* case, as here, the fund was a constructive trust raised by the court in the property of the fraudfeasor as trustee *ex maleficio*. In the *Stewart* case, the fund was the proceeds of a fraudulent transfer in the hands of the transferee. In *Handley* v. *Stutz, supra*, the fund was in the hands of the stockholders of the insolvent corporation. In *Trustees* v. *Beers, supra*, the fund was in the hands of the transferees of the canal property. The list of similar decisions could be extended at great length.

It has never been true that this jurisdiction over a fund depends upon having the physical custody of property lodged in the court or its officers. On the contrary, if the processes of a court have been properly invoked to bring within the court's jurisdiction the persons having the property or assets in question, the court's control of the fund is complete. *Farmer's Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *United States* v. *Bank of New York Co.*, 296 U. S. 463, 477.

Here, as in the cases cited above (*supra*, pp. 38-41), the court has for disposition a specific sum as to which there are a number of claimants. That fund, Black's illegal profits from his sale to N. C. R. A., is now in Black's hands as trustee *ex maleficio*, and he is subject to the orders and directions of the court quite as much as if he had been appointed receiver. Since petitioners accept *Stewart* v. *Dunham* and *Dickinson* v. *Burnham* as correct applica-

tions of the principles just discussed, they cannot logically argue, we submit, that ancillary jurisdiction is improper in this case.

B. The Federal Rules of Civil Procedure Do Not Determine Jurisdictional Questions.

Throughout their brief, petitioners accuse Professor Moore of attempting to extend federal jurisdiction through the medium of Rule 23 of the Federal Rules of Civil Procedure. They point out, quite correctly, that the Rules themselves are merely procedural and thus do not have independent jurisdictional significance. Rule 82 specifically so provides.

Yet, despite their acceptance of this basic premise, petitioners treat the jurisdictional question here presented as if it depended entirely upon whether this case falls within the first, second or third subdivision of Rule 23(a). They thus fall into the very error of which they accuse Professor Moore; that is, they attempt to resolve the jurisdictional question solely by reference to the Rules, without reference to the underlying principles upon which federal jurisdiction depends.[18]

We submit that this approach puts the cart before the horse. The basic question here is whether, under long and well established principles of federal jurisprudence, federal jurisdictional requirements have been satisfied. Whether the action comes within subparagraphs (1), (2) or (3) of

[18] This error is pointed up by the fact that petitioners also argue the *res judicata* effect of judgments in class suits as though that matter depends exclusively upon whether the case falls within Rule 23(a) (1), (2) or (3). (See Pet. Br. 22-23.) But, while Professor Moore made just such a proposal in his tentative draft of Rule 23, the Advisory Committee rejected his attempt thus to give Rule 23 substantive significance. Now petitioners themselves attempt to decide substantive questions solely by reference to the Rule.

Rule 23(a) cannot be decisive of this question. The difficulties that the courts have encountered in determining whether a class action is "true," "hybrid" or "spurious" lend emphasis to this point. The Court of Appeals for the Sixth Circuit has noted, for example that:

> "'The task of pigeonholing operative facts into one of the three categories as of 'true,' 'hybrid,' or 'spurious' suit has baffled both courts and commentators." *System Federation No. 91* v. *Reed*, 180 F. 2d 991, 996.

And Professor Chafee once remarked:

> "The undesirability of this tripartite classification has been pretty well demonstrated by the difficulties which courts have had about putting a class suit into one of the three pigeonholes. It is not uncommon, when a case goes through several courts, for one court to call it spurious and another hybrid, and sometimes the judges throw up their hands in despair, and frankly say they do not know what it is."[19]

Whether or not one agrees with the proposal that the tripartite classification should be abolished, the difficulty of its application points up the fact that the sub-classifications of Rule 23(a) are not themselves jurisdictional statutes. This was very aptly put by Judge Clark in the *Dickinson* case. There, the district court had held the action to be a "spurious" class suit. But Judge Clark remarked:

> "By making use of this euphonious, if mystic, label, the judge has let himself in for a considerable amount of trouble. For the procedural aspects of this appeal are made to turn largely upon arguments and deductions drawn from this observation.
>
> "The convenient use of the appellations 'true,' 'hybrid,' and 'spurious' for determining the effect of a judgment in a class suit under F. R. 23(a) has be-

[19] Chafee, *Some Problems of Equity* (1950), p. 249.

> come rather general; but these labels should not be pressed so far as to obscure the original meaning and purpose of the rule itself." (197 F. 2d at 978-9.)

The court then concluded, upon analysis, that:

> "* * * we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably." (197 F. 2d at 979.)

Since the circumstances of this case are so nearly the same as those in *Dickinson*, this is squarely applicable precedent for concluding that this is also a Rule 23(a)(2) or "hybrid" class suit. That subdivision refers to actions in which the rights asserted are "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." As we have pointed out, the property here involved, a constructive trust fund, is of precisely the same nature as the fund involved in the *Dickinson* case, and there is an equal necessity for adjudicating the claims to participate in the fund.

This conclusion is also required by the decision of the Third Circuit in *Pennsylvania Co. For Insurances* v. *Deckert*, 123 F. 2d 979, 983, holding that when individual plaintiffs having individual causes of action "have also a right to a common fund or in common property, the class action may be 'hybrid.'" And see 3 Moore's *Federal Practice*, p. 3441.[20]

In sum, the decisions of this Court and the federal courts generally over many years past justify and require

[20] In this connection it should be noted that in *Knowles* v. *War Damage Corp.*, 171 F. 2d 15, 18 (D. C. Cir.), quoted by petitioners (Pet. Br. 17-18), Judge Prettyman described the claims involved in a "spurious" class suit as "several and *not interdependent*," thus recognizing that suits involving interdependent claims involve something more than merely common questions of law or fact.

the conclusion reached by the Second Circuit in the *Dickinson* case. Since this case is precisely analogous on its facts, there can be no real question but that intervention by other members of the class without regard to diversity of citizenship was perfectly permissible and proper. Petitioners' arguments to the contrary all ultimately founder on a single, vital, conclusive fact: The claims here involved are not "separate and distinct claims related solely in the sense that there is a common question of law or fact involved," as charged (Pet. Br. 24) but, on the contrary, are interdependent claims to a trust fund subject to the control and disposition of the court.

III.

THE JURISDICTION OF THE COURTS BELOW IS ALSO SUSTAINED BY THE ALLEGATION OF A FEDERAL STATUTORY CAUSE OF ACTION.

Respondents have dealt fully with petitioners' contention that the claims involved are separate and distinct and, therefore, that each intervener must prove citizenship diverse from that of petitioners, since that was the question upon which this Court granted certiorari. Quite apart from any question as to diversity of citizenship, however, the jurisdiction of the federal court in this case is established by the allegation in the complaint of a federal statutory cause of action.

In paragraph 3 of the amended complaint in the original federal action herein it is alleged:

> "The plaintiff avers that this action arises also under the Constitution and laws of the United States." (R. 13.)

In paragraph 8(f) it is alleged that:

> "In connection with the purchases of securities herein described, the defendant William H. Black and Dale

G. Ives [fol. 15] made use of the United States mails and of means and instrumentalities of interstate commerce,

"(1) to employ the devices, schemes and artifices to defraud,

"(2) to make the untrue statements of material facts and to omit to state the material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and

"(3) to engage in the acts, practices and course of business which operated as a fraud and deceit upon the plaintiffs, all as herein set forth." (R. 15; see also R. 45.)

These allegations are based upon, and substantially repeat, Rule X-10B-5 of the Securities and Exchange Commission, 17 CFR § 240.10b-5. This rule is, in turn, based upon Section 10(b) of the Securities and Exchange Act of 1934, 15 U. S. C. § 78j(b). It is well established that a private cause of action may be brought under Rule X-10B-5. *Fratt* v. *Robinson*, 203 F. 2d 627, 631 (9th Cir.); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (2nd Cir.) Respondents' complaint thus alleges both federal and common law causes of action, the facts as to Black's fraud in the acquisition of respondents' stock going equally to support both causes of action.

The decisions of the federal courts applying Rule X-10B-5 hold that that provision encompasses the same types of claims that have heretofore been brought under common law fraud theories. In *Fratt* v. *Robinson, supra*, for example, the court said:

"In a sense, of course, the instant action is based upon a statute, but it is also based upon fraud which has been the subject of common law concern through the centuries." (203 F. 2d at 635.)

Moreover, Rule X-10B-5 adopts the most liberal state rules relating to fraudulent acts involving securities. As Professor Loss stated:

> "Now there are superimposed on this common-law background the several anti-fraud provisions of the SEC statutes. It is obvious from the language that some of the basic problems are the same—what is false, what is a fact and what is material. Because of the legislative background it seems reasonable to assume at the very least that the most liberal common-law views on these questions should govern under the statutes."[21]

It is clear, therefore, that respondents pleaded a good cause of action arising under the laws of the United States. *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2 Cir. 1951); *Fratt* v. *Robinson*, 203 F. 2d 627 (9 Cir. 1953); *Errion* v. *Connell*, 236 F. 2d 447 (9 Cir. 1956); *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E. D. Pa. 1946); *Remar* v. *Clayton Securities Corp.*, 81 F. Supp. 1014 (D. Mass. 1949); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 135 F. Supp. 176 (D. Del. 1955), aff'd 235 F. 2d 369 (3 Cir. 1956); *Loss, Securities Regulation* 1043-66 (1951, Supp. 1955).

A substantial federal cause of action having been alleged, there was pendent jurisdiction over the equivalent common law cause of action under state law. *Siler* v. *Louisville and N. R. R. Co.*, 213 U. S. 175; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593; *Hurn* v. *Oursler*, 289 U. S. 238; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315. The fact that only the common law cause of

[21] Loss, *Securities Regulation* (1951), pp. 816-17. The relation between the actions under Rule X-10B-5 and common law fraud theories is well illustrated by the leading case of *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 828, where both federal and state law claims based on the same facts were finally sustained, although the state law claim had once been dismissed.

action was ultimately relied upon in the Court of Appeals as the basis for recovery does not affect the jurisdiction:

> "The Federal questions * * * gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Siler* v. *Louisville & N. R. R. Co., supra* at page 191.

Assuming *arguendo,* therefore, that the jurisdictional question presented by petitioners is actually present in the case and that diversity jurisdiction was lacking over the Constants' claims, the Court of Appeals' judgment would be supported by the allegation of the equivalent claims arising under the laws of the United States.

IV.

PETITIONERS' SUBSIDIARY ARGUMENTS ATTEMPT TO RAISE ISSUES FORECLOSED BY THIS COURT'S ORDER ON CERTIORARI AND INTRODUCE PATENT IRRELEVANCIES.

A. The View That Diversity Jurisdiction Should Be Abolished Provides No Proper Basis for Judicial Action.

Petitioners invite this Court to reflect in its determination of the present issue an assumed conviction that diversity jurisdiction should be abolished (Pet. Br. 30-31) and, to that end, quote from a statement of Mr. Justice Frankfurter's well-known views on this subject. They even review at some length testimony in support of the most recent of the long series of unsuccessful efforts in Congress "to narrow diversity jurisdiction, or to eliminate it completely."

It would seem necessary, in order to complete the record, to have added that Mr. Justice Frankfurter has also insisted that his views as to the desirability of diversity jurisdiction provide no proper basis for judicial action in the face of a contrary legislative determination. In his dissent in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 336 *et seq.*, he stated:

> "* * * whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. See 13 Cornell L. Quart 499, 520 *et seq.* But I must decide this case as a judge and not as a legislative reformer.
>
> "Aside from the Johnson Act of May 14, 1934, 48 Stat. 775, c. 283, 28 USC § 41(1), the many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. Again and again legislation designed to make inroads upon diversity jurisdiction has been proposed to Congress, and on each occasion Congress has deliberately refused to act."

Moreover, there are no reasons of policy of which we are aware that could be cited to justify a constriction of judicial power in a manner that precludes the final and equitable disposition of the controversies properly brought in the federal courts. Even an opponent of diversity jurisdiction might be expected to agree that, if a court is required to exercise such jurisdiction at all, it should have the power properly to determine the controversies brought before it in accordance with long-accepted standards of adjudication. This was the very point made by Judge Clark, speaking for himself and Judges L. Hand and Swan in

Lesnick v. *Public Industrials Corporation,* 144 F. 2d 968, 973-4 (2nd Cir.):

> "But jurisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. • • • Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counterclaims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation. Consequently the adding of parties under the rules has been viewed in the light of the ancient and well-established principle that a federal court has 'ancillary' jurisdiction to complete adjudication of interrelated matters where its jurisdiction has once been competently invoked" (144 F. 2d at 973-974).

The asserted undesirability of diversity jurisdiction generally is patently not a proper basis on which to modify the principle that in cases within the traditional ancillary jurisdiction of the court, persons asserting claims may intervene without regard to their citizenship.

B. In Arguing Claims of Substantive Error Petitioners Have Disregarded This Court's Limitation of Its Grant of Certiorari.

Pages 33-40 of petitioners' brief are devoted to the argument of substantive law questions which were embraced within the second question presented in their petition for certiorari and were excluded by this Court from its limited grant of certiorari, 352 U. S. 888. These questions are discussed, say petitioners, because they show that "failure to follow jurisdictional rules has been reflected in proced-

ural confusion and substantive error" (Pet. Br. 33-34). This, we submit, is the smallest nose for the largest camel that ever tried to force its way into the tent.

The examples of "substantive error" which petitioners choose to argue turn out to be two of the Court of Appeals' rulings of which petitioners complained in connection with the second question presented in their petition for certiorari. First, they again argue that in applying the Kansas statute of limitations, the Court of Appeals disregarded the evidence in the record on the question, "when did plaintiffs know the facts necessary to discover fraud, if any" (Pet. Br. 35). Second, petitioners claim that the Court of Appeals failed to attempt to determine whether Kansas or Illinois law applied to recovery for corporate wrongs, despite the fact that "while the Court said that the individual former stockholders could recover for the alleged wrong to the corporation, it is clear that the law of Illinois says they cannot" (Pet. Br. 38-39).

We see no point in rearguing these matters. Petitioners contended in their petition for certiorari that the court below was clearly wrong, citing cases, while respondents urged that the court was clearly right, citing cases. When this Court declined to review the state law questions, the matter was closed. For petitioners to reargue the same questions, which have now been conclusively resolved against them, as examples of the "clear error" resulting from disregard of jurisdictional rules not only seems of questionable logic but of doubtful propriety.

Moreover, all of petitioners' arguments as to the possibility that a federal court may not correctly apply state law would apply equally to any diversity case. Petitioners' examples of "substantive error" thus amount to another attack upon diversity jurisdiction *per se*, not upon the necessity for permitting the intervention of non-diverse parties in this case.

C. Petitioners' Suggestion That "Procedural Confusion" Requires a Broad Remand to the Trial Court Constitutes an Effort to Relitigate Substantive Questions Foreclosed by the Order of the Court.

At a number of points in their brief, petitioners have referred to "the failure from the beginning to view federal jurisdiction requirements [as being] of any importance" (Pet. Br. 8, 34, 40). They allege that this has resulted in "procedural confusion" (Pet. Br. 12, 33-34, 40) and that "the litigation is best described as a procedural muddle, which can only be clarified by a complete review of the proceedings below" (Pet. Br. 13, 40). This they describe as a "formidable task" which "could best be done by the trial court upon remand" (Pet. Br. 8, 40). On this basis they suggest a remand of the cause "for re-examination in light of the controlling jurisdictional rules" (Pet. Br. 42).

This Court should recognize petitioners' argument for what it is. Petitioners know that even if they should prevail on the jurisdictional question this Court agreed to review and the case were remanded with directions to dismiss the nondiverse interveners, they would have won a skirmish but lost the war. For they know with certainty that of all the claimants in this case Mr. and Mrs. Constant are the only persons whose citizenship is the same as petitioners'.

It seems clear that from the outset the issue raised as to the lower court's jurisdiction to permit the intervention of the Constants was simply the handmaiden of the effort to obtain a review of the substantive questions decided by the Court of Appeals. To this same end what petitioners seek now, in view of the Court's limited grant of certiorari, is an order that will permit them to contend in the trial court, upon remand, that some of the substantive questions that were resolved against them in the Court of Appeals may be reargued.

Petitioners have accordingly set out to convince the Court that the case should be remanded to the trial court with a broad mandate that would permit the reopening of issues that have already been decided. The vehicle they have selected is "procedural confusion." One would gather from petitioners' brief that the case was haphazardly tried by incompetent counsel on both sides and haphazardly decided by the courts below. Having set out to demonstrate confusion, petitioners not unnaturally profess to find confusion. But saying it, however often, does not make it so. We have undertaken to point out the reasons why the citizenship of the interveners is immaterial. But in any event there is no "confusion." It is quite true that the interveners did not formally allege their citizenship and did not testify that they were "citizens" of Illinois, Florida and Oregon. No attempt to make formal proof of citizenship was being made. It is a fair inference, however, that if a person testifies that he has lived in one small town in southern Illinois for 29 years (R. 137) or 50 years (R. 139) or "all my life" (R. 141), or is engaged in the practice of medicine in a town (R. 139, 140), it will not be any great problem formally to establish his citizenship.

The evidence clearly shows that two interveners, Mr. and Mrs. Constant, were residents of California, where petitioners now also reside.[22] If it was error to have permitted them to intervene, which respondents respectfully deny, they may simply be dismissed. *Conolly* v. *Taylor*, 2 Pet. 556; *Vattier* v. *Hinde*, 7 Pet. 252; *Horn* v. *Lockart*, 17 Wall. 570; *Camp* v. *Gress*, 250 U. S. 308, 317.

Respondents submit that the citizenship of the two nondiverse interveners is immaterial in view of the interdependent nature of all the claims and the existence of a

[22] Despite numerous references to "confusion" on the subject of citizenship, petitioners seem reluctantly to face the reality that actually it is only the Constants whose citizenship is nondiverse. (Pet. Br. 9, 13-14, 41.)

federal question. If this Court should disagree, however, and should sustain petitioners' contention that the claims involved are "separate and distinct," by the same token the dismissal of the Constants' claims should not deprive all other respondents of the fruits of the judgment below. If their testimony in this record does not itself suffice (R. 137-147) nothing would be required upon remand except formal proof of citizenship by respondents, and any order of remand should so provide.

Petitioners also profess to find "confusion" in the situation as regards Black-Marshall. They assert that the corporation is a necessary party, that it must be aligned as a defendant, and that this raises jurisdictional problems which must be resolved by the trial court (Pet. Br. 14, 40-41).[23] Petitioners do not ask this Court to review the correctness of these assertions, in uncharacteristic deference to this Court's limitation of its grant of certiorari; indeed, they note that to do so "is hardly possible on this record" (Pet. Br. 40).

These assertions, which petitioners ask this Court to accept as if they were self-evident, are incorrect in fact and law and, again, constitute an attempt to reopen substantive decisions of the Court of Appeals. That court held that respondents' right to have the 32,000 odd shares fraudulently issued to Black excluded from participation in the proceeds of the sale was *not* sustained as a corporate claim but was one inhering in the former stockholders as beneficiaries of the trust (R. 454-455).

In arguing that the trial court must be permitted to determine "whether Black-Marshall was and is a necessary party in any such recovery" (Pet. Br. 41), petitioners are

[23] It should be noted in passing that Black-Marshall was dissolved in 1947, two years before these actions were commenced; that it was dismissed as a named party; and that its receivers have been active plaintiffs in this litigation ever since the dissolution of the company was set aside.

simply asking that this Court permit the trial court to review and overrule the Court of Appeals with regard to the nature of the claim involved in the invalidation of the 32,000 shares. In the trial court, obviously, petitioners would make the same arguments that appear at pages 37-40 of their brief in this Court, which in turn repeat arguments made at pages 26-32 of their petition for certiorari in support of their second question presented—which this Court declined to review. In short, petitioners would like to parlay claimed "procedural confusion" into a complete retrial of this case, more than eight years after it was commenced and nearly five years after trial.

CONCLUSION.

The writ of certiorari should be dismissed as improvidently granted, or the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DOUGLAS F. SMITH,
ARTHUR R. SEDER, JR.,
MARTIN M. LUCENTE,
RICHARD L. SELLE,
11 South La Salle Street,
Chicago 3, Illinois,

D. ARTHUR WALKER,
201½ South Summit Street,
Arkansas City, Kansas,
Attorneys for Respondents.

BURRELL BARASH,
JACK O. BROWN,
OLIVER H. HUGHES,
SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

APPENDIX.

The question argued by petitioners, but not presented by the facts of this case, turns on whether Rule 23(a) is in effect simply a restatement of former Equity Rule 38 and covers the same ground as the old rule, or whether subparagraph (3) of 23(a) goes beyond the scope of Rule 38.

In *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, this Court, after reviewing the history of class actions in the federal courts, said:

> "The subject is provided for by Rule 38 of the Equity Rules of this court promulgated in 1912, which reads: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.' As the rule formerly read it contained the following provision 'but in such cases the decree shall be without prejudice to the rights and claims of the absent parties.'
>
> "The District Court held that this change in the rule could not affect the jurisdictional authority of the court, * * *. (pp. 363, 364)
>
> * * * * *
>
> "The change in Rule 38 by the omission of the qualifying clause is significant. It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. Street's Federal Equity Practice, vol. 1, § 549.
>
> * * * * *
>
> "Rule 38, as amended, was intended to apply to just such cases. * * * Of course, mere considerations of inconvenience cannot confer jurisdiction, but it is to

be noted that if the Indiana citizens are not concluded by the decree, and all others in the class are, this unfortunate situation may result in the determination of the rights of most of the class by a decree rendered upon a theory which may be repudiated in another forum as to a part of the same class.

"If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented." (pp. 366, 367)

This Court thus seems clearly to have held that in class actions within the scope of Equity Rule 38, namely actions in which "the question is one of common or general interest * * *," the court has ancillary jurisdiction to determine the claims of non-diverse interveners.

Federal Rule 23(a) seems to have been intended merely to cover the same types of cases that had been held to be proper class actions within Equity Rule 38. The Notes of the Advisory Committee on the Federal Rules state with respect to Rule 23:

"Note to subdivision (a). This is a substantial restatement of former Equity Rule 38 (representatives of class) as that rule has been construed." (28 U. S. C. A. following Rule 23.)

And in *System Federation* v. *Reed*, 180 F. 2d 991, 995 (6th Cir.), the court observed:

"* * * According to Dean Charles E. Clark, now Judge Clark of the United States Court of Appeals for the Second Circuit, formerly Reporter to the Committee, Rule 23 was an attempt at clarification of an ancient rule of equity, the limits of which had always been doubtful. Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland 1938, page 263. The federal rules have in no wise limited or restricted the right to bring class suits in proper cases, as was previously provided for by the former equity rule."

Petitioners now contend that to permit the intervention of non-diverse parties in class actions under subparagraph (3) of Rule 23(a) will "contravene the established jurisdictional limitations on the federal courts." (Pet. Br. 11.) The issue thus raised between petitioners and Professor Moore appears to be whether subparagraph (3) of Rule 23(a) permits the bringing of class actions not comprehended by Equity Rule 38. Petitioners must contend that this Court's Advisory Committee was mistaken in its conclusion that Rule 23(a) merely restates the substance of Equity Rule 38.

Stated differently, the question is whether, when the right sought to be enforced is "several, and there is a common question of law or fact affecting the several rights" within Rule 23(a)(3), the action necessarily involves questions "of common or general interest" within Equity Rule 38, or whether, on the other hand, Rule 23(a)(3) authorizes class actions not permissible under Equity Rule 38, contrary to the evident intent of the Advisory Committee. This is an interesting question, but it is not presented for decision by this case.